

*a***HARRIS MOHD SALLEH****v.****THE RETURNING OFFICER (ISMAIL MAJIN) & ORS***b*

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
MUHAMMAD KAMIL AWANG J
[ELECTION PETITION NOS: K5-1999 & K11-1999]
22 FEBRUARY 2000

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ELECTION: *Petition - Notice of Petition - Service - Whether personal service valid - Whether time limit mandatory - Election Petition Rules 1954, rr. 10 & 15*

d

ELECTION: *Petition - Electoral roll - Challenge to validity - Whether can be heard by election court - Whether can be brought by way of election petition*

e

CIVIL PROCEDURE: *Striking out - Election petition - Lack of particulars - Whether sufficient ground to strike out - Factors the court considers - Rules of the High Court 1980, O. 18 r. 19*

CIVIL PROCEDURE: *Jurisdiction - Court - Election court - Jurisdiction of election court - Challenge to electoral roll - Whether election court has jurisdiction*

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Two petitions were brought in respect of the same election in the same constituency, involving the same principal parties, and as such were consolidated and heard together.

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The second respondent in the first petition, Yong Teck Lee ('Yong'), was also the 3rd respondent in the second petition. The petitioner in the second petition, Chong Eng Leong, was also the 6th respondent in the first petition. As the issue in the first petition involved only the petitioner and Yong, all the other respondents were either excluded or not represented.

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Service of the notice of presentation of petition was effected on Yong's firm of solicitors which accepted service although it had not been appointed to do so under r. 10 of the Election Petition Rules 1954 ('the EPR'). Subsequently, Yong appointed a different firm of solicitors under r. 10 to act for him.

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The issues before the court were: (i) whether the provisions of rule 15 of the EPR were mandatory and had been complied with if personal service was effected although there was no express provision in the rule to allow

for personal service; (ii) whether the electoral roll was open to challenge for illegality; and (iii) whether the petitions should be struck out under O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC'). a

Held:

[1] The use of the word 'shall' in r. 15 in relation to the time of service makes it mandatory that notice of presentation of a petition must be made within 15 days. b

[2] However the use of the word 'may' in relation to the method of service renders this second limb of the rule merely directory and not mandatory. Although there is no express provision for personal service, by the same token, it is not prohibited either. In the court's view, personal service is the best form of service and satisfies r. 15. c

[3] In this case, Yong knew of the service on his firm and had not objected to it. He had not acted promptly under r. 10 to appoint an advocate to act for him nor provided an address for service of notices. As such, the petitioner had taken a reasonable step in serving the petition on Yong's firm of solicitor, and notice had been effectively served. d

[4] Under art. 119 of the Federal Constitution, only citizens have the right to vote. An electoral roll which contains the names of non-citizens is tainted with illegality and is wrong *ex necessitate legis*. The election court may enquire into the alleged illegality as there is no law which prohibits the hearing of such challenges against an electoral roll. Neither is there a written law which provides that an electoral roll cannot be challenged by way of an election petition. e
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[5] For pleadings to be struck out under O. 18 r. 19 of the RHC, they have to be hopeless, baseless or without foundation in law or equity or an abuse of the process of the court. Lack of particulars in an election petition is not a ground simpliciter to strike out a petition. g

[Appeal dismissed.]

Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 2 MLJ 112 (**refd**)
Attorney General of Duchy of Lancaster v. London & North Western Railway Co [1892] 3 Ch 274 (**foli**) h
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (**foli**)
Bong Geok Beng v. Ahmad Nordin Mohamed Amin & Anor [1980] 1 MLJ 167 (**refd**)
Chong Thain Yun v. Watson & Anor [1968] 1 MLJ 65 (**foli**)
Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 (**foli**) i

- a* Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 1 MLJ 697 (*refd*)
Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 (*refd*)
Muip Tabib v. Dato' James Wong [1971] 1 MLJ 247 (*fol*)
PP v. Lau Kee Hoo [1983] 1 MLJ 157 (*refd*)
Raja Ahmad Raja Sulaiman v. Hj Mohd Daud Ja'afar & Anor (unreported)
- b* Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 (*refd*)
Re Telok Blangah Election [1981] 1 MLJ 278 (*fol*)
Rhina Bhar v. Karpal Singh Ram Singh & Ors [1995] 4 CLJ 642 (*fol*)
Sim Kee Chon v. Superintendent of Pudu Prison [1985] 2 MLJ 385 (*fol*)
- c* Tengku Korish v. Mohamed Jusoh & Anor [1970] 1 MLJ 6 (*fol*)
Tg Nawawi Tengku Ab Kadir v. Lokman Muda & Ors [1996] 1 CLJ 551 (*dist*)

Legislation referred to:

- Election Acts 1958, s. 15
Election (Conduct of Elections) Regulation 1981, reg. 14
Election Petition Rules 1954, rr. 10, 15
- d* Federal Constitution, arts. 4(1), 113(5), 119(1)
Kelantan Constitution, arts. XXX1A
Rules of the High Court 1980, O. 18 r. 19

Other source(s) referred to:

- e* Halsbury's Laws of England, 4th edn, vol 37, para 430
Mallal's Supreme Court Practice, 2nd edn, vol 1, p 222
- For the petitioner - Ansari Abdullah; M/s Ansari Abdullah Advocates
For the 1st respondent - Abu Bakar Jais, Senior Federal Counsel
For the 2nd respondent - John Sikayun (P.K. Lim & Alex Decena with him); M/s Luping & Co.
- f* For the 6th respondent - Yunof Maringking (Anita Pariuk with him); M/s Maringking & Co.

Reported by Anne Khoo

JUDGMENT

g **Muhammad Kamil Awang J:**

- There are two petitions, Election Petition No. K.5/1999 and K.11/1999, which are consolidated into one, as they concern the same election in respect of the same constituency N.13 Likas, and between the parties
- h* which are invariably the same, except that in Petition No. K.11/1999 the petitioner, Chong Eng Leong appears as the 6th respondent in the former petition. As the issue in Election Petition K.5/1999 involved only the petitioner and Yong Teck Lee (2nd respondent), the 1st and 7th respondents were excluded, whilst the 3rd, 4th and 5th respondents were not represented
- i* and they too dropped out.

The preliminary objections and the notice of motions raised by the respondents may be grouped into three main topics: *a*

Rule 15 Of The Election Petition Rules 1954

The non-compliance with r. 15 of the Election Petition Rules 1954, the questions raised are as follows: *b*

- 1) Whether the provisions in rule 15 are mandatory; and
- 2) Whether personal service within the fifteen days limit is sufficient to satisfy r. 15.

Rule 15 of the Election Petition Rules 1954 states: *c*

Notice of the presentation of a petition, accompanied by a copy thereof, shall, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate had been appointed, or no such address given, by a notice published in the Gazette or in a newspaper circulating within the constituency or electoral ward in which the election was held, or posted on the notice board of the High Court in the State in which that constituency or electoral ward is situated, stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar. *d*

There are two limbs in this r. 15: one as to time of service and two as to the mode of service. In the first limb, the time of fifteen days of the presentation of the petition, is expressed in mandatory terms; the word used is “shall”; it is therefore mandatory that such service must be made within the prescribed time, *ie*, fifteen days of the presentation of the petition, and failure to comply strictly with the time for service will render the petition a nullity. *e*

There is a plethora of cases in support of this; in *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261 where Lord Upjohn said at p. 264: *f*

So the whole question is whether the provisions of rule 15 are “mandatory” in the sense in which that word is used in the law, *ie*, that a failure to comply strictly with the times laid down renders the proceedings a nullity; ... *g*

His Lordship said further at p. 265:

On the whole matter their Lordships have reached the conclusion that the provisions of rule 15 are mandatory, and the petitioner’s failure to observe the time for service thereby prescribed rendered the proceedings a nullity. *h*

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a See also *Muip b. Tabib v. Dato' James Wong* [1971] 1 MLJ 247; *Tengku Korish v. Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6; *Chong Thain Vun v. Watson & Anor* [1968] 1 MLJ 65 and *Rhina Bhar @ Rani Raj Pal v. Karpal Singh a/l Ram Singh & 2 Ors* [1995] 4 CLJ 642.

b The 2nd limb of r. 15 prescribes the modes of service which are not mandatory, and the word used is “may” which is directory. There are five modes of service mentioned in r. 15 which are specially mentioned in the alternatives, and a petitioner may choose to comply with at least one of the modes, eg. by Gazette notification or by advertisement in newspapers etc. It is clear that the mode of service is directory and that any one mode of service may be used. That is to say, a petitioner may observe one mode of service, it is sufficient for the purpose of service under r. 15. This found support in *Muip b. Tabib v. Dato' James Wong (supra)* where B.T.H. Lee J said at p. 249:

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d To my mind rule 15 is not mandatory as to the mode of service. The word “shall” appears in the first sentence of the rule, which indicates that the rule is mandatory, but I am of opinion that where the rule is directory as to the mode of service, substantial compliance is sufficient.

e See *Raja Ahmad b. Raja Sulaiman v. Haji Mohd Daud bin Ja'afar & Anor* (Petisyen Pilihanraya No. 33-5-Tahun 1995, Kota Bharu) (unreported).

Personal Service

f “Personal Service” is implicit in r. 15. The purpose of service under r. 15, is to give notice that a petition in respect of a particular election in a particular constituency has been presented. In my view, personal service is the best form of service although there is no express provision for personal service in the rule in as much as there is no prohibition of personal service in the rule. A personal service within the prescribed time is good service to all intents and purposes – r. 15. I am fortified in my view by the following authorities:

g In *Nair v. Teik* [1967] 2 All ER 34, the Privy Council held there that rule 15 was not complied with as there was no personal service nor notice in the Gazette within the 10 days of the presentation of the petition and that the provisions of rule 15 are mandatory. This was followed in *Chong Thain Vun's* case (*supra*) where Lee Hun Hoe J (as he then was) said:

h ... personal service which seems to be possible under section 7(2) of the Courts of Judicature Act, 1964 was not considered. The truth is that petitioners were doubtful that personal service was open to them as rule 15 is not as precise and clear as one would like it to be on the question of personal service.

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That personal service is possible seems implicit from the language used in *Devan Nair v. Yong Kuan Teck* by Lord Upjohn when he said: a

Rule 15 was not complied with strictly for there was no personal service and no notice in the Gazette within 10 days of the presentation of the petition.

In *Re Telok Blangah Election* [1981] 1 MLJ 278, Sinnathuray J held that: b

(1) rule 15 requires that notice of the presentation of a petition accompanied by a copy thereof shall within 10 days of the presentation of the petition be served by the petitioner on the respondent. Such service means personal service and personal service means serving the respondent with a copy of the election petition and showing him a sealed copy if he desires it. However, leaving copy of the petition with a subordinate officer of Ong Kok Min was not personal service on him; c

In the case of Petition no. K.5/1999, the notice of the presentation of the petition had been served on the respondent's own solicitors firm which accepted service on his behalf although it was not appointed under r. 10. There is no doubt at all that the respondent knew of the service of the notice on the firm which had accepted it on his behalf and he had not objected to the service of the notice on his solicitor's firm. It seems to me that the service is good as notice received is notice served. Subsequently the respondent appointed a firm of solicitors under r. 10 to act for him. Rule 10 of the Election Petition Rules 1954 states: d

10. Appointment of advocate by respondent e

Any person returned may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him, appointing an advocate to act for him in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within Malaysia at which notices addressed to him may be left. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force. f

There is no evidence that the respondent had promptly left at the office of the registrar, a writing appointing an advocate to act for him or stating that he intends to act for himself, and in either case, giving an address within Malaysia at which notices addressed to him may be left. Thus the petitioner had taken a reasonable step to serve the petition on the respondent's solicitor firm which is ready and willing to accept service on behalf of the respondent. g

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The mode of service in r. 10 appears to be directory only, the word used is "may". In the event that a person does not send or leave at the office of the registrar, a formal writing stating that he will appoint an advocate or he intends to act for himself and no address is given, should there be a petition which i

a affects him, a personal service may be effected. The discretion is with the court to decide whether it is sufficient if service is effected by serving the petition on him eg, the firm of the respondent's solicitor as in this case.

b By the subsequent appointment of an advocate to act for him under r. 10, does not invalidate the service which had been effected earlier. I hold that in the circumstances, the notice had been served on the respondent, and r. 15 is satisfied.

c In another case, learned counsel submitted that a personal service was bad as it was not one of the modes prescribed by r. 15. In my view, a personal service has been proven, which is undoubtedly the best form of service and it satisfies r. 15; see *Chong Thian Vun's case (supra)* and *Re Telok Belangah Election case (supra)*.

The Electoral Roll

d The second topic was that an electoral roll is open to challenge for illegality.

e The Federal Constitution (hereinafter referred to as "the Constitution") established an Election Commission whose duty is to see and conduct a fair and democratic election in the country. For the purpose of carrying out its function the Election Commission may make rules and regulations which must be consistent with the Federal laws.

Article 113(5) of the Constitution expressly provides that

f So far as may be necessary for the purposes of its function under this Article the Election Commission may make rules, but any such rules shall have effect subject to the provisions of federal law.

Thus the Election Commission is empowered to make rules, *inter alia*, to prepare an electoral roll which must not be inconsistent with the Constitution. Article 119(1) of the Constitution states:

g Every citizen who –

(a) has attained the age of twenty-one years on the qualifying date; and

(b) is resident in a constituency on such qualifying date or, if not so resident, is an absent voter,

h is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly unless he is disqualified under Clause (3) or under any law relating to offences committed in connection with elections; but no person shall in the same election vote in more than one constituency.

i It is clear that under art. 119 of the Constitution, only citizens, unless

disqualified, have the right to vote. In other words, the right to vote is conferred by the Constitution only on citizens. This right is an exclusive right of citizens, which is non-alienable and cannot be bought or sold. In compiling an electoral roll, in Sabah it is governed by the Election (Registration of Electors) Regulations (Sabah) 1971, which is made pursuant to s. 15 of the Election Acts 1958, it is the primary duty of the Election Commission to see that only citizens are registered as voters and non-citizens, eg, illegal immigrants and those who are not entitled to vote, must not be registered as voters or put on an electoral roll. An electoral roll which contains the names of non-citizens is wrong *ex necessitate legis*. If it is alleged that an electoral roll is illegal because it carries the names of non-citizens etc. then the court may inquire into the alleged illegality within the spirit of the Constitution.

It is of paramount importance that the registration of voters must be in accordance with laws passed by Parliament which laws must be consistent with the Constitution. The doctrine of the supremacy of Parliament as applied in the United Kingdom, does not apply in Malaysia. In *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112 Tun Suffian LP said:

Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

Under our Constitution written law may be invalid on one of these grounds:

- (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or
- (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or
- (3) in the case of State written law, because it is inconsistent with Federal law, article 75.

The court has power to declare any Federal or State law invalid on any of the above three grounds.

The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land in any proceeding whether it be started by Government or by an individual.

The court, *ie*, the High Court, may declare invalid any law enacted by Parliament or a State Legislature which is inconsistent with the Constitution, and an Election Court has no less the same jurisdiction. The Election Court has the jurisdiction to hear and determine the legality of an electoral roll

- a* and there is no law that prohibits the hearing of such challenges made against an electoral roll in an Election Court. An electoral roll is *prima facie* evidence that a person is entitled to vote in a constituency, *vide* reg. 14 of the Election (Conduct of Elections) Regulation 1981. If it should appear that there is evidence to show that non-citizens have been
- b* registered in an electoral roll as voters, that electoral roll is tainted by an illegality for the inclusion of non-citizens in an electoral roll, contrary to the law. In my view, an electoral roll which contravenes the provisions of the election laws and the Constitution, and admits non-citizens or those
- c* citizens who are disqualified by the law may be challenged. Needless to say, an electoral roll may be challenged on the grounds of illegality in that non-citizen's names have inadvertently been entered into the roll, and the Election Court may make such a declaration that an electoral roll is illegal as contrary to federal law and therefore, is null and void.

- d* In *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 1 MLJ 697, the Supreme Court declared that art. XXXIA of the Kelantan Constitution is inconsistent with the Federal Constitution. Article 4(1) states:

- e* This Constitution in the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

In *Loh Kooi Choon v. Government Of Malaysia* [1977] 2 MLJ 187, His Lordship Raja Azlan Shah J (as His Royal Highness then was) said:

- f* The constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that
- g* no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.

- h* There is no written law which provides that an electoral roll cannot be challenged by way of an election petition.

- i* It had been brought to the attention of this court the decisions in *Wong Phin Chung v. The Election Commission & 5 Ors* (Election Petition No. K 1 of 1994) and *Tg Nawawi bin Tengku Ab Kadir @ T Putra v. Lokman bin Muda & 2 Ors* [1996] 1 CLJ 551, but they can be

distinguished in that the decisions therein are peculiar to the facts in each case and there is no challenge made against the validity of an electoral roll which had been certified as correct. Moreover they are the decisions of courts of co-ordinate jurisdiction whose decisions are persuasive only. It is useful to quote Wan Yahya J (as he then was) in *Bong Geok Beng v. Ahmad Nordin bin Mohamed Amin & Anor* [1980] 1 MLJ 167.

The prerogative of determining the correctness or otherwise of High Court decisions lies with the court above. For the purpose of deciding this issue I shall confine myself only to the question whether that judgment is sufficiently persuasive to move this court into applying it in the present case.

In *Public Prosecutor v. Lau Kee Hoo* [1983] 1 MLJ 157, Tun Suffian LP, declined to follow the Indian cases, said:

With respect we declined to do so, because, first there is no knowing how long we would have to wait and, secondly, we should decide cases before us in the light of our own constitution, our own laws and the conditions in our own country which are not necessarily the same as conditions in other countries.

In my judgment, an Election Court has the jurisdiction to hear a challenge in respect of an electoral roll which is vitiated by an illegality, eg, the entry into an electoral roll of names of non-citizens or disqualified citizens who are not entitled to vote in any election to Parliament or State Assembly. I hasten to add that I find no provision in any written law that prohibits a challenge to an electoral roll in an Election Court and that it may be brought before another forum which forum has not been established by the law.

Striking Out Petition Under Order 18 Rule 19 Of Rules Of The High Court 1980

The principle is very well settled that “it is only in plain and obvious” cases that recourse should be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980.

The summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it ‘obviously unsustainable’. per Lord Lindley in *Attorney General Of Duchy Of Lancaster v. London & North Western Railway Co* [1892] 3 Ch. 274; see also *Sim Kee Chon v. Superintendent Of Pudu Prison* [1985] 2 MLJ 385 (SC).

In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court held that:

- a* The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it ‘obviously unsustainable’ (see *AG of Duchy of Lancaster v. L & NW Rly Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors* [1965] 1 WLR 1238, [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* (*supra*)).
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- c*

The words “frivolous or vexatious” as stated in *Mallal’s Supreme Court Practice*, 2nd edn, vol. 1, at p. 222 means:

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- By this is meant a case which is obviously frivolous or vexatious or obviously unsustainable, per Lindley LJ in *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co.* [1892] 3 Ch 277. The pleading must be “so clearly frivolous that to put it forward would be an abuse of the process of the Court” per Jeune P., in *Young v. Holloway* [1895] P. 87 at p. 90.
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An application for striking out a petition simply based on the ground that there are insufficient particulars therein cannot be a good reason for striking out the petition.

- f* *Halsbury’s Laws of England*, vol. 37, 4th edn, para 430 states:

- The court is invested with extensive powers to strike out pleadings and thereupon, or for other good reason arising from the making of the claim or defence, to dismiss actions by the plaintiffs or to enter judgments against defendants. These powers are both salutary and necessary not only to enforce the basic rules of pleadings but also to dispose of proceedings which are hopeless, baseless or without foundation in law or in equity or are otherwise an abuse of the process of the court.
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The pleadings must be hopeless, baseless or without foundation in law or in equity or an abuse of the process of the court before they can be struck out under this r. 19 of O. 18. This is well reflected in *Raja Zainal Abidin bin Raja Haji Tachik & 3 Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16, where the Supreme Court stated at p. 611 that:

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It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

In my judgment, lack of particulars in an election petition is not a ground simpliciter to strike out a petition. The particulars, if insufficient, may be obtained from the petitioner by adopting the procedures as laid down in the Rules of the High Court 1980.

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